NIKMAT MASYHUR SDN BHD A

v.

KERAJAAN NEGERI JOHOR DARUL TA'ZIM

HIGH COURT MALAYA, JOHOR BAHRU B
VERNON ONG LAM KIAT JC
[ORIGINATING SUMMONS NO: (MT-1) 24-3746-2005]
18 JUNE 2008

CIVIL PROCEDURE: *Damages - Assessment of damages - Appeal - Loss of profits - Whether amount awarded excessive - Whether findings of learned deputy registrar fair and reasonable - Whether contentions made by defendant without merit* C

This was an appeal by the defendant against the decision of the learned deputy registrar on the assessment of damages sustained by the plaintiff. The plaintiff and the defendant had entered into a development joint venture agreement ('the JVA'). Pursuant to the JVA it was agreed that the plaintiff would carry out certain residential, tourism and recreational development project ('the development') known as Desa Tasek on the development land. In consideration thereof, the defendant would cause to be alienated to the plaintiff certain portions of the development land ('the lands') for the said development. Pursuant thereto, the plaintiff paid a deposit of RM1.6 million to the defendant. On 10 December 2001 the defendant notified the plaintiff of its decision to terminate the JVA. As compensation to the plaintiff, the defendant agreed to offer to the plaintiff a 5.5 acre freehold land in Johor Bahru. However, by a letter dated 27 July 2005, the defendant offered to the plaintiff the 5.5 acre land on a leasehold basis. The plaintiff did not accept the defendant's revised offer and asked the defendant to make good its original offer. By a letter dated 25 November 2005, the defendant informed the plaintiff that it was not willing to entertain any appeal on this matter. The plaintiff then filed the originating summons ('OS') for damages to be assessed on account of the termination of the JVA. At the hearing of the OS on 16 October 2006, the defendant conceded to the plaintiff's assertion that the defendant's obligation to alienate the lands to the plaintiff took precedence over the plaintiff's obligations to obtain the relevant approvals. On the basis of the said concession, the defendant admitted to liability and D E F G H I

stated its readiness to be assessed on the question of damages. The court accordingly made an order for assessment of damages suffered by the plaintiff as a result of the defendant's termination of the JVA. After hearing of witnesses for the plaintiff and the defendant, the deputy registrar awarded and certified the amount of the damages in the sum of RM52,905,269 together with interest, the breakdown of which was (i) loss of profits RM48,899,102 and (ii) expenditure incurred RM3,906,167. The defendant submitted that the amount awarded by the learned deputy registrar for loss of profits was excessive.

Held (upholding award of deputy registrar; dismissing defendant's appeal):

(1) The loss of profits on the JVA which the plaintiff would suffer was the natural and probable result of the breach of the JVA by the defendant. When the defendant entered into the JVA with the plaintiff, the defendant well knew of the loss that the plaintiff would incur should the defendant break the JVA. At the time of the making of the JVA, it must have been within the contemplation of the plaintiff and the defendant that in the event of the defendant's breach of the JVA, the probable and natural result would be the plaintiff's loss of profits. It was also testified by the plaintiff's witness that the expenditure of RM3,911,252.10 was incurred by the plaintiff prior to the JVA as early as 1995 until 18 December 2006. In the course of his testimony SP1 also referred to various documentary evidence in support of the plaintiff's claim. SP1's evidence on the expenditure incurred was not challenged or contradicted by the defendant in cross examination. The learned deputy registrar was correct in awarding the sum of RM3,906,167.27 on account of expenditure incurred by the plaintiff. (paras 9, 10)

(2) The defendant had submitted that the award for loss of profits should be limited to 10% of the damages assessed. The contrast between the amount of the quantum for loss of profits of RM48,999,102 awarded by the deputy registrar and the sum of RM10,751,053 contended by the defendant was predicated, upon closer examination, on essentially two aspects of total revenue and the plaintiff's financing cost. In deriving the total revenue both parties have included the total revenue from all saleable units in the development which comprised of two floating restaurants, 456 units of apartments (made up of

336 units of types A, B, C and D luxury apartments and 120 units of Warisan apartments) and four units of bungalows. Under cross examination, witness for the defendant SD2 admitted that in determining the market value of the luxury apartments, he had taken into account (i) RM3.10 per square foot as valued by the plaintiff's witness SP3 and (ii) the proposed prices stated in the JVA. However, SD2 admitted that he was not aware that the proposed prices in the JVA were prepared by a quantity surveyor and not a valuer. Further, the proposed prices in the JVA were prepared on an unspecified date. As such the proposed prices were not reliable for the determination of the market value of the luxury apartments. In the particular circumstances of this case, the evidence of the plaintiff's witness SP4 was preferred in the light of the inconsistencies inherent in the valuation approach adopted by SD2. This finding was fortified by the unchallenged evidence of SP4 whose opinion of the fair market value of the luxury apartments was based on sales of comparable properties within the locality of the land in question at the material time of the valuation. For the aforesaid reasons, the deputy registrar's finding that the market price of RM3.10 per square foot for the luxury apartments was fair and reasonable in the circumstances. (paras 13, 16, 17 & 18)

(3) In arriving at the total revenue of the development, SD2 had factored a discounted price of 15% in respect of 40% of the luxury apartments reserved for Bumiputra buyers. According to the plaintiff's witnesses the probable take-up rate for the Bumiputra units for the luxury apartment would be about 12%. The plaintiff's contention was not challenged or contradicted by the defendant. Instead, the defendant's contention was predicated upon the premise that the plaintiff would not be permitted to sell the unsold Bumiputra units. Notwithstanding the express reservation of 40% of units for sale to Bumiputra purchasers, cl.16.2(a) also provided that the plaintiff may, subject to the State Government's approval to dispose of the unsold Bumiputra units. In this case, JVA was a commercial transaction between the plaintiff and the defendant. The proper approach was to interpret the agreement in a way that was consonant with business common sense. In the defendant's computation of the loss of profits in the assessment of damages the 40% Bumiputra

reserved units remained static. It was premised upon the assumption that all the Bumiputra units would be sold. The defendant's assumption was unreasonable and unrealistic. Further, such an interpretation of cl.16.2 would lead to an absurd and illogical situation whereby the unsold Bumiputra units would remain unreleased and unsold indefinitely. Applying the approach applied by the Court of Appeal in *Mars Equity Sdn Bhd v. Tis 'Ata'ashar Sdn Bhd*, the defendant's interpretation would make no commercial sense whatsoever. In the exercise of the court's judicial function this court was of the view that it was entitled to rely on what was common and public knowledge in arriving at an assessment of damages. The deputy registrar accepted the provision of 12% for Bumiputra purchasers in the plaintiff's computation of the loss of profits. He found that a provision of 12% was more logical. Hence, the deputy registrar's findings that the plaintiff's provision of 12% reservation of the luxury apartments for Bumiputra purchasers was in the circumstances of this case reasonable. (paras 19, 20, 22, 23, 24 & 25)

(4) According to a registered valuer, SP4, financing costs should be calculated on the basis of 30% of the development costs. SP4 also testified that a provision of 30% for financing costs of the development costs was more reasonable whilst 70% would come from the progress payments derived from sales. SP1 testified that financing would be required for one year at an interest rate of 11%. The period of one year was also consistent with the unrebutted evidence of the plaintiff that there would be a full take-up sales rate within 12 months. The finding of the learned deputy registrar that the financing costs should be calculated on the basis of 30% of the development costs was, in the circumstances, fair and reasonable. (para 27)

(5) The JVA was between the plaintiff and the defendant. The defendant is the Johor State Government itself. The defendant's principal obligation under the JVA was the alienation of the development land to the plaintiff and this the defendant failed to do. The only approvals required under the JVA were those in relation to the carrying out of construction works. The JVA was not a conditional agreement subject to the consent or approval of the Johore State Government being obtained. Further, at the hearing of the OS, the

defendant conceded to the plaintiff's assertion that the defendant's obligation to alienate the lands to the plaintiff took precedence over the plaintiff's obligations to obtain relevant approvals. On the basis of the said concession, the defendant admitted to liability and stated its readiness to be assessed on the question of damages. The defendant's contentions herein were without merit. (paras 29 & 33)

Case(s) referred to:

Antaios Compania Naviera SA v. Salen Rederierna AB [1985] AC 191 ***(refd)***

Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Anor [1993] 2 CLJ 495 SC ***(refd)***

Bumiputra-Commerce Bank Bhd, Kuala Terengganu v. Chendering Development Sdn Bhd & Ors [2004] 1 CLJ 781 CA ***(refd)***

Central Malaysia Development Company Ltd v. Chin Pak Chin [1967] 1 LNS 15 HC ***(refd)***

Daishowa (M) Wood Products Sdn Bhd v. Kepong Wood Products Co Sdn Bhd [1980] 1 LNS 14 FC ***(refd)***

Dato' Mohd Anuar Embong & Anor v. Bank Bumiputra (M) Bhd [1997] 2 CLJ 475 CA ***(dist)***

Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1985] 1 LNS 157 PC ***(refd)***

Hadley v. Baxendale [1854] 156 ER 145 ***(refd)***

Kokomewah Sdn Bhd v. Desa Hatchery Sdn Bhd [1995] 3 CLJ 511 CA ***(dist)***

Mars Equity Sdn Bhd v. Tis 'Ata'ashar Sdn Bhd [2005] 1 CLJ 513 CA ***(refd)***

Tham Cheow Toh v. Associated Metal Smelters Ltd [1972] 1 LNS 153 FC ***(refd)***

Toeh Kee Keong v. Tambun Mining Company Ltd [1967] 1 LNS 197 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 74(1), (2)
Land Acquisition Act 1960, s. 37

For the plaintiff - Thomas Philip; M/s Thomas Philip
For the defendant - Dato' Rahman (Sharizal Shaari with him); State Legal Advisor, Johor

Reported by Suhainah Wahiduddin

A

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] This is an appeal by the defendant against the decision of the learned deputy registrar made on 3 September 2007 on the assessment of damages sustained by the plaintiff.

B

Background Facts

[2] The plaintiff and the defendant entered into a Development Joint Venture Agreement dated 28 February 1995 ('the JVA'). Pursuant to the JVA it was agreed that the plaintiff would carry out certain residential, tourism and recreational development project ('the Development") known as "Desa Tasek" on the Development Land (defined therein). In consideration thereof the defendant would cause to be alienated to the plaintiff certain portions of the Development Land ('the lands') for the said Development. Pursuant thereto the plaintiff paid a deposit of RM1.6 million to the defendant. On 10 December 2001 the defendant notified the plaintiff of its decision to terminate the JVA. As compensation to the plaintiff the defendant agreed to offer to the plaintiff a 5.5 acre freehold land in Johor Bahru. However, by a letter dated 27 July 2005 the defendant offered to the plaintiff the 5.5. acre land on a leasehold basis. The plaintiff did not accept the defendant's revised offer and asked the defendant to make good its original offer. By a letter dated 25 November 2005 the defendant informed the plaintiff that it was not willing to entertain any appeal on this matter. Owing to this impasse the plaintiff filed the originating summons ('OS') for damages to be assessed on account of the termination of the JVA.

C

D

E

F

G

Hearing Of The Originating Summons

[3] The defendant's main contention was that the defendant terminated the JVA due to the plaintiff's failure to obtain the relevant approvals for the Development. However, at the hearing of the OS on 16 October 2006 the defendant conceded to the plaintiff's assertion that the defendant's obligation to alienate the lands to the plaintiff took precedence over the plaintiff's obligations to obtain the relevant approvals. On the basis of the said concession the defendant admitted to liability and stated its readiness to be assessed in the question of damages. The court

H

I

accordingly made an order for the assessment of damages suffered by the plaintiff as a result of the defendant's termination of the JVA. The defendant did not appeal against the said order of the court.

Assessment Of Damages By Deputy Registrar

[4] After hearing of witnesses for the plaintiff and the defendant the learned deputy registrar awarded and certified the amount of the damages in the sum of RM52,905,269 together with interest, the breakdown of which is as follows:

1. Loss of profits RM48,899,102

2. Expenditure incurred RM3,906,167

Assessment Of Damages – The Law

[5] The law on compensation for loss or damage caused by breach of contract is governed by sub-sections (1) and (2) in s. 74 of the Contracts Act 1950 which read as follows:

> 74 (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

[6] The measure of damages recoverable therefore involves the consideration of s. 74 which substantially affirms the common law rule laid down in *Hadley v. Baxendale* [1854] 156 ER 145. The common law rule affecting the measure of damages came up for consideration by the Federal Court in *Toeh Kee Keong v. Tambun Mining Company Ltd* [1967] 1 LNS 197. Ong Hock Thye FJ said:

> The rule lays down the main principles as follows:
>
> > Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably

A

> be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

In more compendious terms the rule has been restated by Asquith LJ in *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* in a passage which I shall quote in full:

B

> (1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: *(Sally Wertheim v. Chicoutimi Pulp Co.)* This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss *de facto* resulting from a particular breach, however, improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule. Hence,

C

D

(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.

E

(3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

(4) For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is

F

taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary sense. This is the subject matter of the 'first rule' in *Hadley v. Baxendale, supra*. But to this knowledge, which a contract breaker is assumed to possess whether he actually possesses it

G

or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable.

H

(5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach

I

of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (see certain observations of Lord du Parq in the recent case of *Monarch Steamship Co. Ltd. v. Karlshamms Oljefabriker (A/B)*).

(6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge that defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parq in the same case at page 158, if the loss (or some factor without which it would not have occurred) is a 'serious possibility' or a 'real danger'. For short, we have used the word 'liable' to result. Possibly the colloquialism 'on the cards' indicates the shade of meaning with some approach to accuracy.

[7] In short, the common law rule in the assessment of damages consists of two limbs. The first limb concerns damages flowing naturally, ie, in the normal course of things from the breach. The second limb concerns the damages that the parties at the time of the making of the contract may reasonably be supposed to have contemplated, as the probable result of the breach. This court is also mindful that in the assessment of damages for breach of contract, the general rule is that the aggrieved party be put in the same position as if the contract had been performed; so that normally he is entitled to recover from the contract breaker his loss of profits, or the benefit of the bargain, as it is often called, (see *Central Malaysia Development Company Ltd. v. Chin Pak Chin* [1967] 1 LNS 15.)

[8] Before the learned deputy registrar the plaintiff submitted their claim under two heads, namely – (i) loss of profits, and (ii) expenditure incurred.

In respect of item (ii) above evidence in support of the expenditure incurred was adduced by the plaintiff's witness Ong Tee Thong (SP1). According to SP1 the expenditure incurred by the plaintiff in connection with the JVA comprised of the following:

No.	Particulars	Amount
1.	Bayaran Kepada Kerajaan Negeri Johor	RM1,600,000.00
2.	Yuran Professional (Consultant)	RM2,258,439.94
3.	Majlis Bandaraya Johor Bahru	RM 31,690.00
4.	Bayaran Marketing	RM 21,122.33
	Jumlah	**RM3,911,252.27**

[9] Applying the approach on the basis of the aforesaid principles and authorities to item (ii) above, the question to be answered is whether the expenditure incurred by the plaintiff is something that occurs naturally from the defendant's breach. In support of this claim, SP1 testified that the expenditure of RM3,911,252.10 were incurred by the plaintiff prior to the JVA as early in 1995 until 18 December 2006. In the course of his testimony SP1 also referred to various documentary evidence in support of the plaintiff's claim. SP1's evidence on the expenditure incurred was not challenged or contradicted by the defendant in cross-examination. The learned deputy registrar was quite right in awarding the sum of RM3,906,167.27 on account of expenditure incurred by the plaintiff. At the hearing of the appeal the defendant abandoned this issue and concentrated their main attack against the damages awarded for loss of profits under item (i) above. In the premises, the assessment of the learned deputy registrar awarding the sum of RM3,906,167.27 for expenditure incurred is upheld.

[10] As to item (i) above, applying the approach on the basis of the aforesaid principles and authorities, the first issue for determination is whether loss of profits is something that occurs naturally from the defendant's breach of the JVA. Pursuant to the JVA the defendant would stand to benefit in two respects. In the first instance the defendant would be entitled to receive the 'Consideration Units' being a certain number of completed units of residential and/or business units (defined therein). In addition thereto the defendant would also receive a cash payment of RM8,211,060 from the plaintiff. For its part, the plaintiff also stood to make a handsome profit from the JVA. In this regard it is observed that an estimate of the plaintiff's profit of RM29 million is included as an appendix in the JVA under "Appendix I Proposal Documents". In short, both the plaintiff and the defendant stood to gain from the JVA if it had proceeded on to completion. This court is therefore of the view that the loss of profits on the JVA which the plaintiff would suffer was the natural and probable result of the breach of the JVA by the defendant. When the defendant entered into the JVA with the plaintiff, the defendant well knew of the loss that the plaintiff would incur should the defendant break the JVA. The second issue relates to whether the plaintiff's loss of profits was something within the contemplation of the parties to the JVA. Upon an examination of the JVA and for the

reasons cited above the irresistible inference to be drawn is this: at the time of the making of the JVA it must have been within the contemplation of the plaintiff and the defendant that in the event of the defendant's breach of the JVA the probable and natural result would be the plaintiff's loss of profits. In this case the proper measure of damages was not the normal measure of damages under s. 74(1). The JVA was a contract for a definite and specific purpose *viz*, the development of the multi-million residential, tourism and recreational development project known as "Desa Tasek". The purpose was clearly within the knowledge of the parties at the time of entering into the JVA and the consequence of its breach must have been within the contemplation of the parties. Once the plaintiff had proved that the kind of damages suffered was foreseeable then the defendant is liable to the full extent of it whether foreseeable or not provided that the extent of the damages claimed has been established on the balance of probabilities.

[11] In *Bank Bumiputra Malaysia Bhd. Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Anor* [1993] 2 CLJ 495 the bank, after studying the borrower's proposals for the land purchase and housing development granted bridging finance to the borrower. When the borrower defaulted in servicing the interest, the bank withdrew the facility and claimed for the amount outstanding inclusive of interest and cost. The borrower counterclaimed for damages for breach of the bridging loan agreement. The bank were found to be in breach of contract when it treated the term loan as an on demand loan and recalled it prematurely before its right to do so had accrued and the borrower were entitled to damages. On the consequent issue of the borrower's claim for damages the Supreme Court held that (i) there had been negotiations between the bank and the borrower before the bank agreed to give the bridging finance and the bank were fully aware that the borrower would receive no income from the project until the sale and purchase agreements for the project were signed, and (ii) the loss of profits on the housing development project which the borrower would suffer was the natural and probable result of the breach of the agreement by the bank and when the bank agreed to provide the bridging finance to the borrower, the bank well knew of the loss that the borrower would incur should the bank break the contract. At p. 504 Abdul Hamid bin Hj Omar LP speaking for the Supreme Court had this to say:

> As for the claim for other damages suffered, we do bear in mind s. 74 of the Contracts Act which is declaratory of the common law rules as to assessment of damages in contract enunciated in *Hadley v. Baxendale* [1854] 9 Ex, 34. Once the claimant had proved that the kind of damages suffered was foreseeable then the guilty party is liable to the full extent of it whether foreseeable or not provided that the extent of the damages claimed has been established on the balance of probabilities. In other words, it would not be sufficient for a claimant to merely show that the extent of damage alleged was merely possible. To hold otherwise would dispense with proof of quantum altogether. (See *Litigation Support and Financial Assessment of Damages* by D. R. Chilver and CJ Lemar p. 57)

[12] In *Bumiputra-Commerce Bank Bhd, Kuala Terengganu v. Chendering Development Sdn Bhd & Ors* [2004] 1 CLJ 781 the appellant bank filed a suit against the respondent housing developer for default of an overdraft facility granted for bridging finance of a housing project. The respondent subsequently filed a suit against the appellant bank for damages as a result of a breach of the facility agreement by the appellant bank. Both suits were consolidated. The High Court found in favour of the respondent granting, *inter alia*, damages in the sum of RM29,279,017.58. At the Court of Appeal it was held that the High Court's finding that this was a contract for a definite purpose that was clearly known to the appellant bank and within its contemplation was correct. It was also held that the appellant bank's call on the respondent to service interest and the subsequent recall of the loan facility for non-payment of interest was unlawful and improper. In commenting on the damages claimed by the respondent arising from the appellant bank's breach, the Court of Appeal held that the proper measure of damages was not the normal measure of damages under s. 74(1). This was not a simple contract to lend money but a contract for a definite purpose. The purpose was clearly within the knowledge of the parties at the time of entering into the agreement and the consequence of its breach must have been within the contemplation of the parties. Thus all losses claimed by the respondent out of the transaction between the parties arose naturally from the breach by the appellant bank. The losses were also within the contemplation of the parties as likely to arise from such a breach within the requirements of s. 74 and the rule in *Hadley v. Baxendale*.

[13] In the present case the defendant is saying that the amount awarded by the learned deputy registrar for loss of profits was excessive. Learned counsel for the defendant submitted that the award should be limited to 10% of the damages assessed or to the sum of RM16,936,810. In the assessment of the quantum for loss of profits certain matters of speculation will be involved and this may, on the fact of it, present some difficulty in assessing damages. However, where there it is clear, as in this case, that there has been actual loss resulting from the breach of the JVA, it is not necessary that there should be absolute measure of damages. Indeed, the difficulty of assessing damages is no bar to the recovery of damages. It is also not necessary to have an absolute measure of damages since to a certain extent damages would be a matter of speculation.

[14] In *Tham Cheow Toh v. Associated Metal Smelters Ltd* [1972] 1 LNS 153 the appellant sold a metal melting furnace to the respondent. The appellant's undertaking to the respondent that the melting furnace would have a temperature of no lower than 2,600 degrees F was not satisfied. The respondent alleged that the appellant had breached the contract and claimed damages of RM29,301.38. The trial judge held that the melting furnace did not meet with the specifications thereby constituting a breach of the condition of the contract. A sum of RM7,501.38 was awarded as damages for loss of profits. The Federal Court upheld the trial judge's findings. Ali FJ speaking for the Federal Court said:

> It is true that the amount awarded in this case was merely conjectural. But there was at least some evidence before the court which might support the award.

And continuing at the same page:

> The difficulty in assessing damages was also considered in *Chaplin v. Hicks.* On page 795 Fletcher Moulton LJ said:
>
> > ... I think that, where it is clear that there has been actual loss resulting from the breach of the contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate, it is not necessary that there should be an absolute measure of damages in each case. There are no doubt well-settled rules as to measure of damages in certain cases, but such accepted rules are only applicable where the breach is one that frequently occurs. In such cases the Court weights the pros and cons and gives

> advice, and I may almost say directions, to the jury as regards the measure of damages. This is especially the case in actions relating to sale of goods of a class for which there is an active and ready market. But in most cases it may be said that there is no recognised measure of damages, and that the jury must give what they think to be an adequate solatium under all the circumstances of the case. Is there any such rule as that, where the result of a contract depends on volition of an independent party, the law shuts its eyes to the wrong and says that there are no damages? Such a rule, if it existed would work great wrong.

[15] In this case, the defendant's contention that the damages should be assessed in the sum of RM10,571,053 is premised on a report entitled "Pendapat Berkenaan Anggaran Keuntungan Bagi Cadangan Pembangunaan Projek Penswastaan "Desa Tasek" Dengan Kerajaan Johor Diatas Lot 19254, Jalan Tasek Utara, Daerah Johor Bahru" ('the defendant's opinion') dated 10 April 2007 prepared and tendered in evidence by the defendant's witness Zulkefli bin Abdul Rahman (SD2). The loss of profits is derived after the total development costs are deducted from the total revenue. It is important to note that the plaintiff also adopted the same approach in computing their loss of profits. The common approach which was applied by the Federal Court in *Mae Perkayuan Sdn Bhd (supra)* to calculate the measure of damages is this:

Total Revenue minus Total Development Costs = Loss of Profits

[16] The contrast between the amount of the quantum for loss of profits of RM48,999,102 awarded by the learned deputy registrar and the sum of RM10,571,053 contended by the defendant is predicated, upon closer examination, on essentially two aspects of Total Revenue and the plaintiff's financing costs. For convenience, they are summarised as follows:

A. Total Revenue

(i) The market price for type A, B and C luxury apartments; and

(ii) The number of luxury apartments which would be sold to Bumiputra buyers.

B. Development Costs

(i) The fair amount for financing costs.

A. Total Revenue

(i) The Market Price For Type A, B And C Luxury Apartments

[17] In deriving the total revenue both parties have included the total revenue from all saleable units in the Development which comprises of (i) 2 floating restaurants, (ii) 456 units of apartments (made up of 336 units of types A, B, C and D luxury apartments and 120 units of Warisan apartments), and (iii) 4 units of bungalows. For the plaintiff, a written opinion dated 28 December 2006 on the proposed selling prices of the said properties was tendered through Teoh Leong Seng (SP4) a registered valuer of Henry Butcher Malaysia (Johor) Sdn. Bhd. The luxury apartments in question comprising types A, B and C are the same except for the size of the units. In the said opinion of SP4 the market price of the luxury apartments were stated as RM310 per square foot. In another written opinion dated 30 November 2006 of Loo Kung Hoe (SP3) a registered valuer of Rahim & Co (Johor) Sdn Bhd the proposed selling price is stated as between RM295 to RM325 per square feet. Save and except for the 252 units of types A, B and C luxury apartments, the market price for all the other units and bungalows were not challenged or contradicted by the defendant. In fact the defendant accepted the aforesaid selling price of RM310 per square foot as can be seen in the annexure "Lampiran A" to the defendant's opinion. The learned deputy registrar accepted the selling price for the types A, B and C luxury apartments as RM310 per square foot. The learned deputy registrar cited the following reasons for not accepting the evidence of SD2:

> Saya tidak dapat menyetujui keterangan saksi defendan bernama Zukkefli bin Abdul Rahman. Ini kerana di dalam soal balas, saksi ini menyatakan bahawa:
>
> (a) Tiada penjelasan dapat diberikan oleh beliau akan mengapa harga RM310.00 untuk satu kaki persegi bagi rumah pangsa mewah jenis D yang beliau nyatakan tidak boleh terpakai untuk rumah pangsa mewah jenis A, B dan C. Walaupun beliau mengaku dan faham bahawa spesifikasi untuk kesemua unit A, B, C dan D adalah sama melainkan saiz keluasan yang berbeza.

(b) Saksi defendan ini juga mengakui melalui keterangan bahawa harga pasaran yang digunakan pada RM310.00 untuk satu kaki persegi diambil dari harga cadangan seperti mana dimaksudkan di dalam Perjanjian Usahasama Pembangunan bertarikh 28.2.1995 dan telah mempuratakan kedua-dua harga berkenaan dengan harga yang dicadangkan oleh Tetuan Henry Butcher, Malaysia.

(c) Juru nilai defendan itu juga mengakui di dalam pemeriksaan balasnya bahawa juru ukur bahan di dalam perkara ini bukanlah seorang yang layak untuk mengemukakan pendapatnya atas harga-harga rumah pangsa mewah berkenaan. Pengakuan seperti ini jelas menunjukkan ketidak konsistennya dengan pengakuan saksi defendan dalam ini yang mana mengatakan bahawa defendan mengetahui harga-harga yang disediakan adalah seperti mana menurut Perjanjian Usahasama Pembangunan bertarikh 28.2.1995 yang mana telah diperuntukan secara tepat.

(d) Saksi defendan itu juga telah mengakui di dalam soal balas bahawa harga hanya RM310.00 untuk satu kaki persegi seperti cadangan di dalam Perjanjian Usahasama Pembangunan bertarikh 28.2.1995 telah disediakan oleh juru ukur bahan yakni Tetuan Jurukur Bahan Majubina dan bukan oleh seorang juru nilai bertauliah.

(e) Saksi defendan ini juga mengakui bahawa pada satu tarikh yang tidak dinyatakan, harga yang dicadangkan oleh juru ukur bahan adalah terkandung didalam satu laporan bertarikh April 1994 (m.s. 233 Ikatan A) manakala tarikh material untuk tujuan penilaian adalah pada tarikh 1996.

(f) Juru nilai defendan ini juga mengakui di dalam pemeriksaan balas bahawa juru ukur bahan tersebut bukanlah seorang yang layak untuk memberikan pendapatnya ke atas harga-harga rumah pangsa mewah. Pengakuan ini bersama-sama dengan pengakuan defendan mengetahui akan bila harga-harga telah disediakan di dalam Perjanjian Usahasama Pembangunan bertarikh 28.2.1995 itu telah dengan sendirinya menunjukkan bahawa juru nilai defendan bergantung kepada data yang kononnya tidak boleh dipercayai. Sila rujuk kepada m.s. 49 Ikatan Otoriti Plaintif.

(g) Tidak ada penjelasan juga kepada asas 'memperuntukan' harga tahun 1996 berdasarkan asas laporan Tetuan Henry Butcher, Malaysia pada RM310.00 untuk satu kaki persegi dengan harga yang dicadangkan pada tahun 1994 oleh juru ukur bahan seperti mana dilakukan oleh juru nilai defendan memandangkan kedua-duanya langsung tidak berhubung kait.

[18] It was common ground that all the luxury apartment units shared the same specifications. For valuation purposes, the only distinguishing feature of type D luxury apartments were the size of the units. Under cross-examination SD2 admitted that in determining the market value of the luxury apartments he took into account (i) RM3.10 per square foot as valued by SP3 and (ii) the proposed prices stated in the JVA. The market value that SD2 arrived at was the average of the sum total values of (i) and (ii) aforesaid. However, SD2 admitted that he was not aware that the proposed prices in the JVA were prepared by a quantity surveyor and not a valuer. In addition, the material date for valuation is 1996. The proposed prices in the JVA were prepared on an unspecified date in April 1994. As such the proposed prices are not reliable for the determination of the market value of the luxury apartments. SD2 did not provide any basis for averaging the sum total of the two prices. There is no correlation between the two prices for two reasons, namely (a) the two prices are different in time, and (b) a quantity surveyor is not a competent person to opine on the values. In the particular circumstances of this case the evidence of SP4 is preferred in the light of the inconsistencies inherent in the valuation approach adopted by SD2. This finding is fortified by the unchallenged evidence of SP4 whose opinion of the fair market value of the luxury apartments is based on sales of comparable properties within the locality of the land in question at the material time of the valuation. For the aforesaid reasons the learned deputy registrar's finding that the market price of RM3.10 per square foot for the luxury apartments is fair and reasonable in the circumstances.

(ii) The Number Of Luxury Apartments Which Would Be Sold To Bumiputra Buyers

[19] In arriving at the total revenue of the Development, SD2 factored a discounted price of 15% in respect of 40% of the luxury apartments reserved for Bumiputra buyers. According to the plaintiff's witnesses the probable take-up rate for the Bumiputra units for the luxury apartment would be about 12%. The plaintiff's contention was not challenged or contradicted by the defendant. Instead, the defendant's contention is predicated upon the premise that the plaintiff would not be permitted to sell the unsold Bumiputra units. Is the defendant's aforesaid premise valid? The plaintiff's contention is that there is nothing in the JVA to bar the plaintiff from selling the unsold Bumiputra units. The pertinent clause in the JVA is cl. 16.2 which is reproduced below:

A **16.2 Bumiputra Purchasers**

(a) The Company shall have power to dispose of the Special Units to any purchaser of its choice so long as the said purchaser is a Malay as defined in the provisions of the Malay Reservations Enactment, 1936 of Johor and at the
B Fixed Purchase Prices as stipulated under Appendix XI. *In the event that the Company is unable to sell any of the Special Units to any purchaser within one (1) year after the Company have advertised that the Special Units are available for sale, subject to the approval of the State Government first had and obtained,*
C *the Company may be entitled to sell those unsold Special Units at the prevailing market price.*

(b) Subject to clause 16.2(a), the Company shall reserve forty percent (40%) of the units for sale to Bumiputras only and shall sell such reserved Units to Bumiputras at prices which
D are fifteen percent (15%) lower than the selling prices of the Units of the same type to non-Bumiputras but otherwise on the same terms and conditions as in the case of a sale to non-Bumiputras. (emphasis added)

E **[20]** Notwithstanding the express reservation of 40% of units for sale to Bumiputra purchasers, cl. 16.2(a) also provides that the plaintiff may, subject to the State Government's approval dispose of the unsold Bumiputra units. In this case the JVA is a commercial transaction between the plaintiff and the defendant.
F The proper approach is to interpret the agreement in a way that is consonant with business common sense. As Lord Diplock said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191 at p 201:

> While deprecating the extension of the use of the expression
G 'purposive construction'; from the interpretation of statutes to the interpretation of private contracts, I agree with the passage I have cited from the arbitrator's award and I take this opportunity of restating that, if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion
H that flouts business common sense, it must be made to yield to business common sense.

This business common sense approach was adopted by the Court of Appeal in *Mars Equity Sdn Bhd v. Tis 'Ata'ashar Sdn Bhd* [2005] 1 CLJ 513. In that case the parties entered into two contemporaneous
I agreements. A sale of land agreement for the transfer of land from the respondent to the appellant. The second agreement, a timber agreement for the felling and extraction of timber. The respondent

did not transfer the land under the sale of land agreement. The appellant, on the other hand, did not apply for a timber licence as required under the timber agreement. The appellant applied for specific performance to compel the respondent to transfer the land. The High Court dismissed the appellant's claim. At the Court of Appeal the appellant argued that both agreements should be read together. The respondent, however, contended that it was for the appellant to apply for the timber licence first before the respondent should perform its obligation. Since the appellant did nothing the respondent contended that there was nothing for it to perform. The issue before the Court of Appeal was the sequence in which the promises of the parties were to be performed. The Court of Appeal held that where several documents forming part of one transaction are executed contemporaneously, all the documents must be read together as if they are one. The respondent was clearly in breach of its primary obligation to transfer the land to the appellant. Therefore, it was not in a position to call for the performance of the appellant's obligation under the timber agreement to apply for the licence. Gopal Sri Ram JCA speaking for the Court of Appeal said:

> It follows that the respondent was clearly in breach of its primary obligation to transfer the land to the appellant. Therefore, it was not in a position to call for the performance of the appellant's obligation under the timber agreement to apply for the licence. The present case, in my judgment, falls plumb within s. 55 of the Contracts Act 1950. That section says:
>
> > When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, the promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which the other party may sustain by the non performance of the contract.

[21] Ong Tee Hong (SP1) testified that cl. 16.2 in the JVA was reflective of the government policy requiring all developers to allocate an initial 40% of units for any projects for Bumiputra purchasers. SP1's testimony on this issue was not challenged or contradicted by the defendant. Notwithstanding the said policy, however, the possibility that not all Bumiputra reserved units would be sold out was contemplated by the parties. This

A contingency is in fact borne out by the express provision in cl. 16.2(a) which provides that in the event the plaintiff 'is unable to sell any of the Special Units to any (Bumiputra) purchaser within one (1) year after the company have advertised that the Special Units are available for sale, subject to the approval of the B State Government first had and obtained, the company may be entitled to sell those unsold Special Units at the prevailing market price.' Thus, it appears to have been accepted as a commercial reality by both parties that not all the units reserved for Bumiputras would be necessarily sold out.

C

[22] In the defendant's computation of the loss of profits in the assessment of damages the 40% Bumiputra reserved units remained static. It is premised upon the assumption that all the Bumiputra units will be sold. The defendant's assumption is D unreasonable and unrealistic for the reasons given above. Further, such an interpretation of cl. 16.2 would lead to an absurd and illogical situation whereby the unsold Bumiputra units would remain unreleased and unsold indefinitely. Applying the said approach applied by the Court of Appeal in *Mars Equity Sdn Bhd* E *v. Tis 'Ata'ashar Sdn Bhd (supra)* the defendant's interpretation would make no commercial sense whatsoever. The plaintiff also submitted that due to the prevailing favourable market situation which lead to many Bumiputra units remaining unsold, the Johor State Government consequently amended its policy reducing the F Bumiputra reserve of 40% to 20% in 2002. This change in the policy is capable of being one of common and public knowledge. As this change of policy will affect not only property developers but the public at large, the new policy will invariably come common and public knowledge.

G

[23] Is the court entitled to rely upon this common and public knowledge of the change in policy? In the exercise of the court's judicial function the court is of the view that it is entitled to rely on what is common and public knowledge in arriving at an H assessment of damages. In *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1985] 1 LNS 157 the respondent agreed to transfer her land to the second appellant as security for an advance of RM220,000. Subsequently the said land was transferred to the second appellant. The second appellant proceeded to transfer the I said land to the third appellant for a consideration of RM220,000 but in fact no consideration passed. The said land was then transferred to a land development company almost wholly owned

by the first appellant. The said land was eventually sub-divided and sold to the public. The respondent claimed damages against the appellants for fraud, undue influence and breach of trust. The learned trial judge's finding that fraud had been established against all three appellants was upheld by the Federal Court. The appellants appealed to the Privy Council against the order to pay to the respondent by way of damages the sum of RM973,000 together with interest. Delivering the judgment of the board Lord Keith said:

> It remains to consider whether Abdul Razak J was entitled to find, as he did, that an increment in value of 140% would have accrued to the land between 1975 and 1982. The only relevant piece of evidence before him was a statement by the respondent's expert witness Chong that there had been a boom in property values during a period up to about 1979. The learned judge, however, expressed himself as proceeding on the view that it had become a matter of public and common knowledge that even if there had been no boom the normal annual rate of increase of land prices had always been generally about 20% a year. He said that this had been confirmed by about 700 land reference cases which had come before him over the past 11 months or so throughout Western Malaysia. The Federal Court did not criticise his approach, nor indeed advert to it at all. There can be no doubt that a judge is not entitled to use his own particular knowledge in arriving at an assessment of damages. In the general exercise of his judicial functions he is, however, entitled to rely on what is common and public knowledge.
>
> The scope of what is common and public knowledge may vary quite widely from one country to another. The fact of a fall over a period in the value of money or a rise in the value of land is a matter which is capable of being one of common and public knowledge. As to whether or not it is so in Malaysia is a question upon which their Lordships would hesitate to venture an opinion. The judiciary of Malaysia are the persons best qualified to answer the question. The learned trial judge has found the particular matter to be common and public knowledge there, and his finding has not been criticised by the Federal Court. Their Lordships are not prepared to interfere with that finding and accordingly reject the appellant's argument.

[24] The learned deputy registrar accepted the provision of 12% for Bumiputra purchasers in the plaintiff's computation of the loss of profits. He found that a provision of 12% is more reasonable and logical for the following reasons:

A Juru nilai defendan memperuntukan 40% kepada pembeli-pembeli Bumiputra untuk rumah pangsa mewah, yang akan dijual pada kadar diskaun 15% manakala plaintif pula memperuntukan 12% kepada pembeli-pembeli Bumiputra untuk rumah pangsa.

B Dalam konteks ini, saya dapat bersetuju dengan peguamcara plaintif yang hanya memperuntukan 12% kepada pembeli-pembeli Bumiputra untuk rumah pangsa mewah. Alasan Mahkamah untuk menerima peruntukan 12% bagi pembeli-pembeli Bumiputra adalah disebabkan:

C a) Peguamcara defendan jelas gagal mematahkan keterangan saksi plaintif bahawa kadar pembelian unit-unit Bumiputra yang paling berkemungkinan untuk rumah pangsa mewah adalah di dalam lingkungan 12%.

D b) Tiada ada terdapat sebarang peruntukan di dalam Perjanjian Usahasama Pembangunan bertarikh 28.2.1995 yang menghalang plaintif dari menjual unit-unit Bumiputra yang tidak dapat dijual.

E c) SP1 ada memberikan keterangan bahawa plaintif dibenarkan untuk menjual unit-unit Bumiputra yang tidak dijual dan keterangan ini tidak dicabar.

F d) Klausa 16.2, Perjanjian tersebut adalah bukti jelas bahawa plaintif tidak dihalang daripada menjual unit-unit Bumiputra yang tidak dapat dijual (seandainya). Saya percaya klausa 16.2 dalam Perjanjian tersebut tidak lebih sebagai polisi biasa dan plaintif diberi kebenaran untuk mentafsirkan perjanjian dengan menggunakan common sense perniagaan.

G e) Pentafsiran jika dibuat ikut cara defendan akan memberi kesan tidak masuk akal. Ini kerana unit-unit Bumiputra yang gagal dijual akan terus kekal tidak dijual. Ini jelas bertentangan dengan common sense perniagaan dan saya tidak dapat bersetuju untuk mengikuti tafsiran sebegitu.

H f) Saya juga dapat bersetuju untuk mengambil kira keterangan saksi defendan, Alim bin Shukur yang mana mengatakan dalam tahun 1996, semua projek pembangunan mesti mempunyai rezab 40% untuk Bumiputra, dan pemaju-pemaju hartanah boleh secara kemudian untuk memohon bagi mendapatkan pelepasan atas unit- unit Bumiputra yang gagal dijual.

I Saksi ini juga mengesahkan bahawa sebab pasaran yang menyebabkan banyak unit-unit Bumiputra tidak dapat dijual.

Kerajaan Negeri Johor kemudiannya telah meminda polisi dengan mengurangkan rezab pegangan Bumiputra kepada 20% (daripada 40%) pada tahun 2002.

Ini jelas menunjukkan bahawa target 12% yang dicadangkan oleh plaintif adalah munasabah dan logik.

[25] For the reasons adumbrated above the court agrees with the learned deputy registrar's findings that the plaintiff's provision of 12% reservation of the luxury apartments for Bumiputra purchasers is in the circumstances of this case reasonable and logical.

B. Development Costs

(i) The Fair Amount For Financing Costs

[26] According to Teoh Seng Leong (SP4) a registered valuer, financing costs should be calculated on the basis of 30% of the development costs. This is because typically the development would be partially financed from sales. On the other hand, the defendant's contention is that the financing costs should be calculated on the basis of 100% of the development costs. Learned counsel for the plaintiff argued that the defendant's contention is totally unjustifiable for the following reasons:

(i) the evidence ignores totally that there is incoming cash flow from the sales of the units to partially finance the development costs thus reducing reliance on bank borrowings for this purpose.

(ii) payments from purchasers will be on a progressive basis. This will provide the cash flow thereby rendering unnecessary a loan on 100% of development costs.

(iii) at any rate, no bank would lend 100% to finance any development costs.

[27] SP4 also testified that a provision of 30% for financing costs of the development costs is more reasonable whilst 70% would come from the progress payments derived from sales. In this respect, it is also noted that Ong Tee Thong (SP1) testified that financing would be required for one year at an interest rate of 11%. The period of one year is also consistent with the unrebutted evidence of the plaintiff that there will be a full take-up sales rate within 12 months. The finding of the learned deputy

registrar that the financing costs should be calculated on the basis of 30% of the development costs is, in the circumstances, fair and reasonable.

Defendant's Submission

[28] Learned counsel for the defendant submitted that the plaintiff was not entitled for any loss of profits because no construction work commenced. He argued that only expenditure incurred after and in connection with the JVA and subject to proof thereof may be allowed as damages. In support thereof learned counsel cited *Daishowa (M) Wood Products Sdn Bhd v. Kepong Wood Products Co Sdn Bhd* [1980] 1 LNS 14. The defendant's contention is without merit because in the present case liability has already been conceded by the defendant. The hearing before the learned deputy registrar is for the assessment of damages on which the principles applicable have already been discussed above. Accordingly, the fact of the plaintiff not having commenced any work is immaterial and of no relevance.

[29] Secondly, learned counsel for the defendant also submitted that the Development was subject to the approval of the Johor State Government. The approval was not granted as the Johor State Government decided to conserve the development land. The plaintiff was informed by the defendant of the non-approval for the Development and even offered compensation by the defendant. If the plaintiff had accepted the defendant's offer the issue of damages would not have arisen. On this premise the defendant's contention is that the plaintiff failed to mitigate the loss after the plaintiff had rejected the defendant's offer of compensation. In the first place the JVA is between the plaintiff and the defendant. The defendant is the Johor State Government itself. The defendant's principal obligation under the JVA is the alienation of the development land to the plaintiff and this the defendant failed to do. The only approvals required under the JVA are those in relation to the carrying out of construction works. The JVA is not a conditional agreement subject to the consent or approval of the Johor State Government being obtained. As the defendant to the JVA is also the Johor State Government, this argument is without any basis whatsoever. Further and as adverted to earlier, at the hearing of the OS the defendant conceded to the plaintiff's assertion that the defendant's obligation to alienate the lands to the plaintiff took precedence over the plaintiff's obligations to

obtain the relevant approvals. On the basis of the said concession the defendant admitted to liability and stated its readiness to be assessed in the question of damages.

[30] Thirdly, learned counsel for the defendant submitted that even if damages is awarded, the plaintiff's entitlement should be limited to only 10% of the total award. In support of this contention learned counsel cited three authorities. In *Talent-Vest Development Sdn Bhd v. Pentadbir Tanah Daerah Raub* (unreported) the High Court at Temerloh held that the plaintiff was only entitled to 10% of the total compensation awarded to the landowner. The award to the landowner arose in connection with the compulsory land acquisition of the landowner's land. In that case the landowner and the plaintiff had entered into an agreement for development. The plaintiff's claim was made under s. 37 of the Land Acquisition Act 1960 on the basis that the plaintiff was a 'person interested'. There was no contractual relationship between the plaintiff and the defendant in that case. The contractual relationship subsisted between the plaintiff and the landowner. The facts of that case are clearly distinguishable from the facts of the present case.

[31] In *Dato' Mohd Anuar Embong & Anor v. Bank Bumiputra (M) Bhd* [1997] 2 CLJ 475 the appellants purchased land with the intention of developing it. They obtained an overdraft facility from the respondent bank to finance the purchase and the development. Subsequently owing to inadequacy of funds the appellant obtained an extension and increase of the overdraft facility. As security for the said extension and increase the appellants provided personal guarantees and a second legal charge over the same land. The respondent bank also agreed to release 11 titles of the sub-divided lots, six to the appellants and five to the government by way of compulsory acquisition. However, the respondent bank failed to discharge the encumbrances of the 11 titles. Following this new arrangements with the respondent bank the appellants entered into a sale agreement in 1983 with a third party in respect of the six titles. The deal fell through because the respondent bank failed to discharge its encumbrances on the land. In 1987 the appellants entered into fresh agreements with different purchasers to sell the six titles. These sales were also aborted because of the respondent bank's failure to discharge its encumbrances on the land. The appellants sued the bank for

unlawfully withholding the discharge of the encumbrances on the titles. The High Court found *inter alia* that the appellants were entitled to damages following the respondent bank's breach in delaying to perform its undertaking to release the 11 titles free of encumbrances but that the measure of damages based on the loss of profits were too remote or not proven. The Court of Appeal held, *inter alia* that the respondent bank did not have special knowledge at the time of contracting the likelihood of damage as a result of their failure to discharge the encumbrances on the titles. Further it held that the measure of such loss or damage could not extend to the loss of profit resulting from the appellants' inability to complete phase III of the project because such loss was not the natural consequence of the bank's breach and it was not foreseeable. Unlike the defendant in the present case the respondent bank in *Dato' Mohd Anuar Embong* did not have any special knowledge of the likelihood of damages as a result of their breach. In the particular circumstances of that case that the appellant's loss was not the natural consequence from the bank's breach and it was not foreseeable. The facts in *Dato' Mohd Anuar Embong* are therefore distinguishable.

[32] In *Kokomewah Sdn Bhd v. Desa Hatchery Sdn Bhd* [1995] 3 CLJ 511 the defendant appointed the plaintiff to construct a chicken farm project for a fee of 15% of the total costs of the project which was budgeted at RM37 million. Disputes arose and the progress of the construction works was not satisfactory. The defendant subsequently terminated the contract. The plaintiff alleged wrongful termination and claimed damages. The defendant counterclaimed for costs of rectification and completion of the defective works. The High Court dismissed the plaintiff's claim and allowed the defendant's counterclaim. In passing, Charles Ho J said that if the plaintiff's claim were to be allowed a profit margin of 10% would be reasonable notwithstanding that on the evidence, the profit margin of 15% of the project costs was very much in the minds of both parties. In that case, however, the plaintiff did not adduce any evidence to substantiate the amount of the damages and the figures stated by the plaintiff. The facts of *Kokomewah* is accordingly distinguishable from the present case.

[33] Finally, learned counsel for the defendant submitted that in this case the amount of the plaintiff's projected profits is stated as RM16,936,810 in the appendix to the JVA. The plaintiff's claim for the damages is in excess of the said sum and should be limited

to RM10,571,053. In support of this contention learned counsel relied on the authority of *Mae Perkayuan (supra)*. In *Mae Perkayuan*, however, there were no projected profits involved. The Supreme Court found that the loss of profits which the borrower would suffer was the natural and probable result of the breach of the agreement by the bank. *Mae Perkayuan* is of no aid to the defendant on this issue. The defendant's contention is without merit.

[34] For the reasons adumbrated above the award of the learned deputy registrar is upheld and the defendant's appeal is dismissed with costs.